IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE **13/5/16** **SIGNATURE**

APPEAL NO: A844/2014
CASE NO: 29728/2004

DATE: 13/5/2016

IN THE MATTER BETWEEN

THEMBENI JOYCE XABA APPELLANT

AND

ROAD ACCIDENT FUND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an appeal against a judgment of 30 July 2013, by the learned Judge *a quo*, Mashile J, when he upheld a special plea of prescription by the respondent, as defendant *a quo*, and dismissed the appellant's claim (as plaintiff *a quo*, litigating in

her capacity as *curator ad litem* of her husband, Sipho Amos Nkosi, to whom I will refer as "Nkosi").

[2] On 17 September 2014, the learned Judge granted leave to appeal to the Full Court of this Division.

[3] In the appeal which came before us, Mr K M Röntgen Snr appeared for the appellant, and Ms K Kollapen appeared for the respondent.

BRIEF SYNOPSIS OF THE CASE

[4] On 30 January 1997 Nkosi was the driver of a motor vehicle when it came in collision with another motor vehicle in the Germiston district in Vosloorus Street.

[5] On 22 January 2002, almost five years after the collision, Mr Röntgen was appointed as *curator ad litem* for Nkosi by the magistrates' court in Brakpan.

[6] Paragraph 1 of the magistrate's order reads as follows:

> "1. Appointing Conrad Martin Röntgen (Snr) as *Curator ad litem* for and on behalf of Sipho Amos Nkosi (ID …) and granting to the applicant the necessary authority to lodge a claim on behalf of the said S A Nkosi against the Road Accident Fund and to do all things necessary to prosecute such claim to its final determination and to settle same."

[7] In November 2004, almost thee years later, a summons was issued, with Mr Röntgen in his representative capacity as the plaintiff and the Road Accident Fund as the

defendant. The summons was issued, purportedly, in terms of the provisions of the Road Accident Fund Act, no 56 of 1996 ("the New Act").

[8] The New Act only came into operation on 1 May 1997, some three months after the collision occurred.

[9] Before us, it was common cause that the action should have been instituted in terms of the provisions of the Multilateral Motor Vehicle Accidents Fund Act no 93 of 1989 ("the Old Act").

[10] For the sake of detail, I add that section 2(2)(a) of the New Act provides:

> "Subject to section 28(1) the Multilateral Motor Vehicle Accidents Fund established by the Agreement concluded between the Contracting Parties on 14 February 1989, shall cease to exist, and all money credited to that fund immediately before the commencement of this Act shall vest in the Fund, all assets, liabilities, rights and obligations, existing as well as accruing, of the first-mentioned fund shall devolve upon the Fund, and any reference in any law or document to the said Multilateral Motor Vehicle Accidents Fund shall, unless clearly inappropriate, be construed as a reference to the Fund."

Section 28(1) of the New Act provides:

> "Notwithstanding section 2(2), this Act shall not apply in relation to a claim for compensation in respect of which the occurrence concerned took place prior to the commencement of this Act in terms of the law repealed by section 27, and any such claim shall be dealt with as if this Act had not been passed."

The Old Act was repealed in terms of Part I of the Schedule to the New Act.

[11] In view of the aforegoing, it follows, as already mentioned, that this action, although purportedly instituted in terms of the New Act, fell to be governed by the provisions of the Old Act.

For present purposes, nothing turns on this, in view of the fact that the parties agreed accordingly, as I have mentioned.

[12] On 22 March 2002, the attorneys acting for Nkosi lodged the prescribed MMF claim forms with the respondent. *Ex facie* the documents, they were accepted and stamped by the respondent. This was more than five years after the collision occurred.

There are indications, amongst the papers, that a claim form may also have been lodged in November 2001, almost five years after the event, but it appears to be generally recognised that the forms were lodged on 22 March 2002. This is probably correct, because it happened shortly after Mr Röntgen's appointment as curator two months earlier. The November date was before Mr Röntgen's appointment. For present purposes, nothing turns on this.

[13] In August 2004, not long before the November 2004 summons, Nkosi was examined by a neuro-surgeon, Dr Earle, presumably for medico-legal purposes to support the damages action against the respondent, and, perhaps, for purposes of the application for the appointment of the *curator ad litem*.

[14] For reasons which will become apparent, it is necessary to make a few remarks about the appointment of the *curator ad litem* by the Brakpan magistrates' court.

No report by Dr Earle was included in the record which came before us, neither were the papers relating to the application for the curator's appointment. I add that, in August 2007, the appellant before us, Ms Xaba, the wife of Nkosi, was appointed as *curator ad litem* by the Brakpan magistrate who, at the same time, discharged Mr Röntgen of his corresponding duties. At the same time Ms Xaba was substituted as the plaintiff, presently the appellant.

[15] Section 33 of the Magistrates' Courts Act, 32 of 1944, simply provides: "the court may appoint a *curator ad litem* in any case in which such a curator is required or allowed by law for a party to any proceeding brought or to be brought before the court".

In Van Loggerenberg, *The Civil Practice of the Magistrates' Courts in South Africa*, 10th ed, vol 2 page 5-42, the following is said:

> "A person who has been declared by a competent court to be of unsound mind, or to be incapable for some reason of managing his own affairs, cannot sue or be sued without the assistance of a *curator ad litem*. If no *curator ad litem* has previously been appointed to him, or if a curator who has been appointed has not the power to bring or defend legal proceedings, application should be made for such appointment, or for the grant of the necessary powers.

Section 33 of the Magistrates' Courts Act empowers the magistrates' courts to appoint a *curator ad litem* to a person in any case in which such a curator is required or allowed by law.

This section must, however, be read subject to section 46(2)(b) (my note: it reads:

'(2) A court shall have no jurisdiction in matters –

(a) ...

(b) in which the status of a person in respect of mental capacity is sought to be affected')

which provides that magistrates' courts have no jurisdiction in matters affecting status. It follows that where, in order to have a *curator ad litem* appointed to a person, it is necessary first to have such person declared to be of unsound mind, the magistrates' courts have no jurisdiction. Application for the appointment of the *curator*, or at any rate for a declaration that such person is of unsound mind, must be made in the High Court. Thereafter action may be instituted against him in the magistrates' courts ..."

[16] In the November 2004 summons, featuring Mr Röntgen, in his representative capacity as plaintiff, and the Road Accident Fund as defendant, it is alleged that as a result of the collision to which I have referred, the plaintiff (*sic*) sustained the following bodily injuries: a fracture of the right femur and "concussion".

It is also alleged that as a result of the injuries the plaintiff (*sic*) received medical treatment, experienced pain and will do so in future, will in future have to undergo further treatment, was unable to work and "will in future be unable to work for certain periods of time".

There is no reference to mental incapacity.

[17] The respondent, as defendant, offered a series of special pleas, which were not presented for consideration before us, except for the special plea of prescription forming the subject of these proceedings.

[18] In this special plea, which was upheld by the learned Judge *a quo*, it was pleaded:

- the Old Act is applicable;
- in terms of the regulations promulgated by virtue of section 6 of the Old Act, the plaintiff, to avoid prescription, had to deliver the claim form to the MMF within two years from the date upon which the claim arose and had to serve summons on the MMF within five years from the date on which the claim arose;
- these time-limits apply to cases, such as the present, where the plaintiff alleged that the collision involving Nkosi was caused by the negligence of the driver of a so-called "unidentified vehicle" where the identity of neither the driver nor the owner thereof could be established. These time-limits are prescribed in regulation 3;
- where the collision occurred on 30 January 1997, the claim was lodged on 22 March 2002 (more than five years after the event) and the summons served

after November 2004 (more than seven years after the event) the claim had become prescribed.

[19] No replication was filed to this special plea of prescription.

[20] I turn to the question of prescription.

HAS THE CLAIM BECOME PRESCRIBED?

[21] Regulation 3, published in terms of section 6 of the Old Act, deals, as I have mentioned, with claims involving unidentified motor vehicles, such as the one under discussion.

[22] Regulation 3(2)(a) reads as follows:

> "(2) The liability of the MMF in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:
>
> (a)(i) a claim for compensation for loss or damage suffered by the claimant shall be delivered to the MMF within two years from the date upon which the claim arose *mutatis mutandis* in accordance with the provisions of Article 62 of the Agreement (my note: this deals with the procedure required to launch a claim for compensation not involving unidentified vehicles and prescribing the forms, matters relating to medical reports and so on);

(ii) the provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability." (Emphasis added.)

[23] In *Moloi and Others v Road Accident Fund* 2001 3 SA 546 (SCA), claims on behalf of three minor children injured in the collision with an unidentified motor vehicle negligently driven by an unknown person, came up for consideration. It was a claim in terms of the Old Act.

[24] The defendant filed a special plea of prescription, relying on the provisions of regulation 3(2)(a) to which I have referred.

[25] The appeal was against the decision by the court *a quo* to uphold a special plea.

[26] In upholding the appeal, it was held that the provisions of Chapter III of the Prescription Act were not ousted in the case of a minor's claim in terms of the agreement (under the Old Act) where such claim arose out of the driving of a motor vehicle of which the identity of neither the owner nor the driver could be ascertained – paragraph [14] and [17] at 552E-G and 552J-553B.

[27] I add, as a matter of interest, that in *Geldenhuys & Joubert v Van Wyk and Another; Van Wyk v Geldenhuys and Joubert and Another* 2005 2 SA 512 (SCA) the position under the New Act was distinguished from that under the Old Act, as held in *Moloi*.

The matter also involved claims by minors for damages flowing from a collision with an unidentified vehicle.

The corresponding regulation 2(4) under the New Act, provides that once a claim has been sent or delivered to the Fund within the two-year cut-off, the liability of the Fund "shall be extinguished upon the expiry of a period of five years from the date on which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law, unless a summons to commence legal proceedings has been properly served on the fund before the expiry of the said period".

At 520H-I, the learned Judge, Cameron JA, as he then was, said the following:

> "In conclusion I emphasise that the current legislation expressly empowers the Minister to subordinate the fund's liability to unidentified vehicle claimants to condition. In *Moloi* it was held, by contrast, that the now-repealed statute did not empower the Minister by regulation 'to endeavour to convert' the fund's 'unconditional liability' into a conditional liability. That, as shown, differs from the position here: section 17(1)(b) clearly subjects the fund's liability to unidentified vehicle claimants to regulatory condition, which was validly imposed."

[28] I turn to the Prescription Act, Act 68 of 1969 ("the Prescription Act").

[29] Chapter III deals with the prescription of debts and includes section 13, the relevant portions of which read as follows:

"**Completion of prescription delayed in certain circumstances. –**

(1) If –

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...; and

(i) the relevant period of prescription would, but for the provisions of this section, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[30] In very concise heads of argument, comprising one and a half pages, Mr Röntgen argued that the learned Judge had erred in holding that the prescription period in this case had not been extended as would happen "in the case of minors and/or those suffering from a mental disability", this being an obvious reference to the provisions of the Prescription Act.

[31] Counsel also argued that the learned Judge had failed to apply the *dicta* in *Moloi* to the present case and erred in applying the principles laid down in *Geldenhuys* and *Joubert*.

This is not correct. The learned Judge, indeed, referred to both these cases and the distinction between the two and recognised that, in an appropriate case, *Moloi* could be applied. However, he held that the report of Dr Earle, which had been relied upon to support the appointment of a *curator ad litem*, did not come to the assistance of the appellant. The learned Judge, having obviously had the benefit of reading the report of Dr Earle (which was not part of the record before us) held that the doctor "however does not categorically state that the plaintiff has had a brain injury which will result in him not appreciating the proceedings before court". The learned Judge expressed the view that Dr Earle alone, without the assistance of a psychologist, could not have been the correct expert to make such a diagnosis. I assume this was a reference to the provisions of High Court Rule 57 dealing with the appointment of curators in respect of persons under disability. Rule 57(3) stipulates:

> "The application shall, as far as possible, be supported by –
>
> (a) ...
>
> (b) affidavits by at least two medical practitioners, one of whom shall where practicable, be an alienist, (which is understood to be a psychiatrist) who have conducted recent examinations of the patient with the view to ascertaining and reporting upon his mental condition and stating all such factors as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and probable duration of any mental

> disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing his affairs. Such medical practitioners shall, as far as possible, be persons unrelated to the patient, and without personal interest in the terms of any order sought."

Ms Kollapen, who obviously had sight of the report by Dr Earle argued, after pointing out that this report was not included in the record by the appellant, that Dr Earle does not "categorically state that the plaintiff has had a brain injury which will result in him not appreciating the proceedings before court". She also argued that "the assistance of a psychologist" may have been useful to the appellant. She argued, correctly in my view, that there was an *onus* on the appellant, relying on the provisions of the Prescription Act, to prove that the patient lacked the mental capacity which would have entitled the patient to the protection afforded by the Old Act. She argued, correctly, that this *onus* was not discharged.

[32] In this regard, it is necessary to mention that Mr Röntgen, perhaps sensing the difficulties confronting the appellant, indicated that he has information about the existence of authority for the proposition that, in a proper case, a court in our position may postpone the proceedings to enable the party in question to present further evidence about the mental state of the patient at the relevant time. He asked for a postponement, which was opposed by Ms Kollapen and not granted. We proceeded to dispose of the hearing, but nevertheless granted Mr Röntgen a few days to come to light with the authority he had in mind, before this judgment was to be finalised.

Counsel duly brought references to two judgments to us in chambers, as he was given leave to do. These are the references:

- *YuKwam v President Insurance Co Ltd* [1963] 1 All SA 347 (T). The applicant, not realising that his marriage was not recognised in this country, and therefore thinking that he was the natural guardian of his minor daughter, instituted action against the repondent on behalf of his minor daughter who had been severely injured in a motor car accident. The respondent was the insurer of the car in question, in terms of Act 29 of 1942.

  The collision took place in July 1960, and the summons was issued in October 1961, with the applicant claiming some compensation for medical expenses in his personal capacity and damages on behalf of his minor daughter in his representative capacity

  When he was informed that he required an appointment as a *curator ad litem* he asked for an order appointing him as such to assist his daughter and ratifying and confirming the steps already taken by him as plaintiff after instituting the action. He also asked for leave to amend the summons accordingly. The order was granted.

  This was, obviously, not a case where further evidence was required. The learned Judge observed that "the courts are generally prepared to grant amendments to pleadings, provided no injustice or prejudice be thereby occasioned to the other party" (at p347).

It was held that "if after the lapse of the period of prescription an entirely new cause of action or a new party be introduced, then, in my view, it is clear, that a prescribed cause or a party whose right of action has become prescribed would be given a new effectiveness to the prejudice of the defendant".

In the present matter, so the learned Judge held, there was no introduction of a new party or a new cause of action, but the amendment merely amounted to a clarification of a step in the proceedings which had insufficiently or imperfectly set out the one cause of action that throughout had been relied upon by the same party. The summons was timeously issued. In the case before us, the "new party" in the person of the curator, was introduced some years after the prescription period had elapsed. The appointment was also flawed, in the sense that the magistrates' court had no jurisdiction to make a finding as to the mental status of the patient.

- *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011). The matter did not involve the question of prescription. The Legal Aid Board applied for a declaratory order defining its rights in respect of an application by four minor children for assistance involving a dispute about their residence which had developed between their divorced parents. It was held that this was not "properly an appeal" and that the court had no original jurisdiction to consider an application of that kind. No order was made. I fail to see any relevance between that finding and the present dispute.

It is also clear that what the appellant is in fact seeking, is leave to place further evidence before this Court of Appeal following an enquiry about the mental health of Nkosi at the relevant time.

In Herbstein & Van Winsen *The Civil Practice of High Courts of South Africa* 5th ed vol 2 at p1241, where this issue is considered by the learned authors, the following is stated:

> "The principles applied in deciding whether to allow a party to place further evidence before a Court of Appeal are as follows:
>
> (i) It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not (later) be allowed to adduce further evidence, unless the circumstances are exceptional.
>
> (ii) The party who makes the application must show that the fact that he has not brought further evidence forward was not attributable to any remissness on his part. He must satisfy the court that he could not have procured the evidence in question by the exercise of reasonable diligence.
>
> (iii) The evidence tendered must be weighty, material and presumably worthy of belief, and must be such that, if adduced, it will be practically conclusive.
>
> (iv) If conditions have so changed that the fresh evidence will prejudice the opposite party, the court will not grant the application, for example if the witnesses for the opposite party have been scattered and cannot be brought back to refute the fresh evidence."

Of course, in this case no application of the kind was offered during the hearing and, in any event, where the collision occurred almost twenty years ago, and where there is no *prima facie* indication that there will be evidence about the mental state of the patient at the time, which may advance the case of the appellant, and where the respondent would in any event have been prejudiced if such a procedure had been allowed, it seems that the principles listed by the learned authors have in any event not been complied with.

[33] In conclusion, it seems to me that the position is as follows:

(i) Where the Old Act applies, the appellant, in a proper case, would have been entitled to rely on the protection of section 13 of the Prescription Act for the prescription period to be delayed.

(ii) In order to qualify for the protection, it would have been necessary for the appellant, where Nkosi was not a minor at any relevant stage, to make out a case for the existence of one of the remaining impediments mentioned in section 13(1)(a), namely insanity, or the patient, Nkosi, being under curatorship.

(iii) It seems to me that the only reasonable interpretation to be attributed to section 13 is that the impediment must exist before the prescription period (in this case two years) has been completed:

- In section 13(1)(a) it is contemplated that the creditor, who is experiencing the impediment, must be prevented thereby from interrupting the running of prescription as contemplated in section 15(1), which provides that "the running of prescription shall, subject to

the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt". Subsection (2) does not apply for present purposes.

- Section 13(1)(i) also contemplates the completion of the prescription period at a time when the impediment is already in existence.

(iv) In the present case, as I have illustrated, Nkosi was not placed under curatorship before the completion of the prescription period: Mr Röntgen was only appointed as *curator ad litem* on 22 January 2002 almost five years after the injury was sustained. The summons was issued more than seven years after the event.

(v) The existence of the remaining impediment, that of insanity, either before the completion of the prescription period or at all for that matter, was not proved:

- According to the remarks by the learned Judge in his judgment, and also the submissions by Ms Kollapen, the evidence of Dr Earle, which we did not have the benefit to read, did not establish the existence of such an impediment. In any event, Dr Earle was only consulted on 27 August 2004, more than seven years after the injuries were sustained.
- Although the learned Judge, in his judgment, assumed in favour of the plaintiff (the present appellant) that the curator appointments of both Mr Röntgen and the present appellant, the wife Ms Xaba, "were validly made by the magistrate's court" this finding cannot override the provisions of sections 33 read with 46(2)(b) of the Magistrates' Courts Act to the effect that the magistrate's court has no jurisdiction "in which the status of a person in respect of mental capacity is sought to be

affected". According to the learned author, *Van Loggerenberg*, *supra*, a High Court application (presumably in terms of rule 57), is required in order to obtain relief of this nature. This was never done.

- In the result, the existence of the remaining impediment, insanity, was never proved by the appellant.

CONCLUSION

[34] In view of the aforegoing, I have come to the conclusion, and I find, that the appellant failed to make out a case for the protection of section 13 of the Prescription Act, and the delay of the prescription period.

[35] In the result, the appeal has to fail.

COSTS

[36] This case involved a consideration of the authorities dealing with the question whether a "creditor" suffering from one of the prescribed impediments, can, in the case of a collision involving an unidentified vehicle, rely on the protection of section 13 of the Prescription Act.

The exercise also involved a determination of the fact that the answer to the question in respect of matters governed by the Old Act, differs from the position in matters governed by the New Act.

[37] To the extent that the question whether the impediment had to exist before completion of the prescription period, also had to be considered, the interpretation of the Prescription Act, to that limited extent, also came into play.

[38] Where Ms Xaba, the wife of Nkosi, was only appointed as the replacement *curator ad litem* in August 2007, more than ten years after the event, I am of the view that it would not be in the interests of justice to order her, albeit in a representative capacity, to pay the respondent's costs flowing from the appeal.

It seems to me that it would be more appropriate not to make any order as to costs.

THE ORDER

[39] I make the following order:

1. The appeal is dismissed.
2. There is no order as to costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A844/2014

I agree

P A MEYER
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

J W LOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 20 APRIL 2016
FOR THE APPELLANT: K M RÖNTGEN SNR
INSTRUCTED BY: RÖNTGEN & RÖNTGEN INC
FOR THE RESPONDENT: K KOLLAPEN
INSTRUCTED BY: IQBAL MAHOMED ATTORNEYS